

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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YU SEN CHEN, individually : 16-CV-4439(PKC)
and on behalf of all other :
employees similarly :
situated, :
Plaintiff, : United States Courthouse
-against- : Brooklyn, New York
MC WHOLESALE DISTRIBUTION :
INC., "ANDY" ZHANG, XIAO MIN :
YANG, :
Defendants. : Monday, April 10, 2017
: 11:00 a.m.
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TRANSCRIPT OF CIVIL CAUSE FOR PROMOTION CONFERENCE
BEFORE THE HONORABLE PAMELA CHEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by Stenographic machine shorthand,
transcript produced by Computer-Assisted Transcription.

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1 (In open court.)

2 THE COURTROOM DEPUTY: Civil cause for premotion
3 conference, Docket 16-CV-4439, Chen versus MG Wholesale
4 Distributing, Inc.

5 Could the parties please state their appearances for
6 the record starting with Plaintiff.

7 MR. BROWN: William Brown for the plaintiff. Good
8 morning, Your Honor.

9 THE COURT: Good morning.

10 THE COURTROOM DEPUTY: And please be sure to use the
11 microphone.

12 MR. BROWN: Thank you.

13 MS. NGUYEN: Good morning, Your Honor. Dong Phuong
14 Nguyen for all the associates for MG Wholesale.

15 THE COURT: Good morning.

16 MS. NGUYEN: Good morning.

17 THE COURT: All right. So we are here on the second
18 premotion conference request of the defendant. And just to
19 recap where we are, back in January of this year the
20 defendants moved to file summary judgment motion, I guess
21 largely aimed at the Fair Labor Standards Act or FLSA claim
22 for probably, I gather the argument was I should dismiss that
23 claim, and then I declined to exercise supplemental
24 jurisdiction over the other state law claims.

25 At the time we had our last conference, I denied the

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1 request to file the summary judgment motion at that time
2 because as I understood it, there was some more discovery that
3 the plaintiff wanted to do. I gather that that has now
4 happened. Notably the defendants were deposed, and I gather
5 there was some surveillance tape and other information that
6 was provided.

7 Is that right?

8 MR. BROWN: Yes.

9 THE COURT: Okay.

10 MR. BROWN: There was actually -- there is a small
11 outstanding issue with the surveillance footage. They
12 produced two segments of video during the relevant period.

13 THE COURT: Right.

14 MR. BROWN: They have claimed that these are the
15 only two segments they have, and I am willing to credit that
16 as long as they provide, you know, some sort of affidavit from
17 their client claiming that these are the only two that were
18 saved.

19 THE COURT: Okay.

20 All right. But so putting aside that issue for the
21 moment, what I gather now, though, from the more recent
22 submissions from the parties is that there is a slightly
23 different issue at play here, and it has to do with some
24 potential negotiated resolution of the FLSA claim before me.
25 It sounds like the plaintiffs are willing -- the plaintiff,

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1 rather, is willing to, in effect, forego, his word, his
2 federal claim and then try to join his New York Labor Law wage
3 claims to a pending State Court case.

4 Is that right?

5 MR. BROWN: That's right. And it's also a wage in
6 our case. The New York case is a claim for untimely wages --

7 THE COURT: Okay.

8 MR. BROWN: -- which was brought substantively
9 because it discussed -- it was first found out during
10 discovery. The issues would have involved pretty much the
11 same kind of discovery. So in terms of judicial economy in my
12 perspective, because the FLSA and New York Labor Law in terms
13 of minimum wage offer almost identical substantive relief, I
14 don't see any reason why we can't just have it all in one case
15 in state court.

16 THE COURT: Right. But explain to me the statute of
17 limitations issues. What I gather the sticking point is that
18 if you just withdraw your claims, you lose the benefit of the
19 safe harbor for statute of limitations purposes?

20 MR. BROWN: That's right.

21 THE COURT: That applies to the state law claims; is
22 that the issue?

23 MR. BROWN: The state law claims were already filed,
24 so -- in the state court --

25 THE COURT: Okay.

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1 MR. BROWN: -- so that's not an issue.

2 THE COURT: Okay.

3 MR. BROWN: The issue is if we were to voluntarily
4 withdraw our FLSA and New York Labor Law claims and then
5 refiled it in New York courts, the statute of limitation would
6 be six years from the date we filed in federal court. We
7 wouldn't get any tolling. If we were to voluntarily withdraw,
8 we would need a tolling treatment from the defendants agreeing
9 for us to toll the New York Labor Law claim from the date of
10 our federal filing, which I see as a reasonable resolution.
11 The safe harbor would apply if the case were dismissed for
12 jurisdictional reasons. So if this Court were to agree with
13 the defendants that the -- there's no FLSA claim and we're to
14 decline exercise of jurisdiction --

15 THE COURT: Right.

16 MR. BROWN: -- that would fall under safe harbor
17 because it would be dismissed based on jurisdiction.

18 THE COURT: I understand exactly what you are saying
19 about what might happen. What I am not clear on, though, is
20 why is there a statute of limitations issue though? Because I
21 think what you just said is it is a six-year statute of
22 limitations for the state law claim.

23 MR. BROWN: Right.

24 THE COURT: If you refiled, let's say tomorrow.
25 Let's suppose the defense does not give in and you are forced

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1 to basically litigate the summary judgment motion and have me
2 rule on it one way or the other, why is your cause of action
3 in peril? It sounds like you have more than enough time still
4 to run under the statute of limitations?

5 MR. BROWN: It wouldn't be in complete peril, but we
6 would lose a portion of our claim. So he worked there prior
7 to 2008. So if we filed, say, a statute of limitation going
8 back to 2011 -- so we would lose two years if we were to
9 file tomorrow.

10 THE COURT: I see.

11 Okay. But it sounds like you do not have much of a
12 bargaining position, because if you -- well, that is not true.
13 I guess if you do not withdraw, then we go through the
14 exercise of a summary judgment motion. You could either win
15 that, in that your FLSA claim survives and your case goes
16 forward before me while your state court case goes forward as
17 well. Although, clearly, whether or not I might not exercise
18 supplemental jurisdiction if you have already a pending state
19 court case that covers most of the claims, right, but not all?

20 MR. BROWN: It's the state court claim is just the
21 late payments issue.

22 THE COURT: I see. Okay. I see. So you need the
23 bulk of your state court claim still here?

24 MR. BROWN: Yes.

25 THE COURT: Okay.

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1 MR. BROWN: And then --

2 THE COURT: That is right.

3 All right. So for you, the only real option if the
4 defense does not want to agree to let you stipulate to a
5 summary judgment -- or actually, let me go back.

6 They want you to stipulate to summary judgment on
7 the FLSA claim, right?

8 MR. BROWN: Yes, Your Honor.

9 THE COURT: But you do not want to do that?

10 MR. BROWN: The reason why I don't want to do that
11 is because if I were to stipulate to summary judgment, that
12 would require me to make an admission as to the hours that he
13 worked. They're claiming that he worked fewer hours than what
14 our claim is, and that's their basis for summary judgment. So
15 if I were to say, We agree. We have to take this on this
16 ground, we would basically be admitting that he worked, you
17 know, ten less hours per week than --

18 THE COURT: You would have a collateral estoppel
19 issue --

20 MR. BROWN: Yes.

21 THE COURT: -- in the state court proceeding?

22 MR. BROWN: Yes.

23 THE COURT: Okay. That makes some sense.

24 All right. So have a seat.

25 I guess, Ms. Nguyen, right?

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1 MS. NGUYEN: Yes, Your Honor.

2 THE COURT: Okay. Tell me why, I guess, it is not
3 in -- well, I think I know why it is not in your client's
4 interest, but you are rolling the dice to some extent if you
5 force the plaintiff to go through a summary judgment motion.
6 You could win it or you could lose it. I know what your
7 arguments are about the records showing that the plaintiff was
8 paid more than minimum wage, even assuming he worked the extra
9 hours that he said, right?

10 MS. NGUYEN: Yes.

11 THE COURT: But the one wrinkle I see in your
12 argument is that when I looked at your letter -- obviously, I
13 do not have the benefit of all the record -- your calculation
14 of \$7 and some change, even crediting his claim that he
15 worked, I think, 72 hours in a week does not account for any
16 overtime, right? So that would just be the straight hourly
17 rate. I just, you know, did the math. I think it was 500 and
18 something. \$550 divided by 75 hours, and that came out to, I
19 think, \$7.63, which you maintain correctly is above the
20 minimum wage. But if he worked 72 hours, he would be entitled
21 to overtime, right?

22 MS. NGUYEN: Well, Your Honor, Plaintiff in this
23 case is covered by the motor carrier exemption.

24 THE COURT: Oh, okay. So he would not be
25 entitled -- wait. So then, FLSA, does that apply to him at

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1 all?

2 MS. NGUYEN: Minimum wage under what Plaintiff is
3 alleging.

4 THE COURT: Okay. But correct me if I'm wrong, if
5 the motor carrier exception applies, I thought FLSA does not
6 apply at all to his claim?

7 MR. BROWN: Just the overtime rules of FLSA don't
8 apply, so minimum wage still applies.

9 THE COURT: I see. Okay.

10 So what would your argument be on summary judgment,
11 their records do not tell the whole story?

12 MR. BROWN: There's two arguments. One is a matter
13 of law and one is a matter of fact. One, my understanding of
14 the FLSA is that the FLSA applies to whatever minimum wage is
15 higher, either the federal or the state. So the FLSA itself
16 in New York applies to New York minimum wage.

17 THE COURT: Okay.

18 MR. BROWN: So therefore, it doesn't matter whether
19 you make -- you know, even if we were to credit factual
20 arguments they make, he would still be under the FLSA because
21 under the regulations, again, says if you -- the FLSA applies
22 to the higher of the minimum wages.

23 THE COURT: The New York minimum wage, is that above
24 \$7.63?

25 MR. BROWN: Yes.

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1 THE COURT: Okay.

2 All right. So that is your argument. But all you
3 have -- so the defendants' argument goes is your Plaintiff's
4 statement that he worked between 72 and 84 hours each week?

5 MR. BROWN: Yes.

6 And the -- there are records, they're punch-clock
7 records. But my client has continuously said that the records
8 could not possibly be accurate because the times on there were
9 well beyond the -- you know, they still -- the start times
10 were beyond the times he started and the end times were well
11 before the times he had ever come back. So when he saw them,
12 he said that they were unbelievable because, you know,
13 basically, I never came back before 3:00 -- 3:00 o'clock. How
14 could this be on the records? So he believes that there was
15 some altercations in the records.

16 THE COURT: But the problem, I think, according to
17 Defendants, is that he signed these time sheets. Did he sign
18 all of them?

19 MR. BROWN: They are signed. It's a little strange,
20 I have to admit. They are signed and they did produce the
21 originals and he did recognize the signature as his, but he
22 still claims that he didn't sign them, so -- I mean, his
23 argument is that they were either forged, the signature was
24 forged itself; or they were somehow digitally changed
25 without -- you know, changing his signature.

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1 THE COURT: Okay.

2 MR. BROWN: You know, something along those lines.

3 But the fact of the matter is, he still claims that
4 the record -- he recognized that he signed a form where he was
5 paid, but he doesn't recognize the form that was produced. He
6 said it's a different -- it looks different. It's a different
7 kind of record.

8 THE COURT: Huh? You realize you have a bit of an
9 uphill battle just based on that recitation of the record. In
10 other words, I do not think it is inaccurate to say that the
11 defendants are going to bring to bear the summary judgment
12 motion a wealth of signed time sheets bearing what is
13 undisputedly your client's signature, and against that and
14 also some time punch-card records that similarly reflect, I
15 guess, what is in the time sheets he signed. But I guess that
16 is merely his statement that he knows he worked longer than
17 the punch card or the timesheets indicate, and that somehow
18 there must have been some doctoring going on?

19 MR. BROWN: That's his claim. And take it to mind
20 that this client actually lives in the warehouse, and he was
21 the only person in the warehouse, you know, before the
22 warehouse would open and he was required to do some work. So
23 he may have punched in after he was already -- when the shop
24 opened, he was already doing an hour or two of work a day.

25 THE COURT: Okay.

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1 MR. BROWN: So there's other issues along those
2 lines that complicate the time cards.

3 THE COURT: All right.

4 All right. Have you figured out how much potential
5 damage he would lose if you voluntarily withdrew this action
6 and decided to combine everything in the state and lose those
7 two years that you mentioned?

8 MR. BROWN: I think it will be fairly substantial.
9 I mean, just give me one minute. I can kind of make an
10 estimation.

11 THE COURT: I have asked because, obviously, what
12 you are doing is buying yourself a summary judgment motion by
13 not agreeing to stipulate -- which I understand why, because
14 you do not want to be barred from asserting certain facts in
15 the state claim case, I gather. I wonder if you can come up
16 with some sort of stipulation that does not require an
17 admission of fact --

18 MR. BROWN: But that's what the --

19 THE COURT: -- because all you are doing is saying
20 you could not show that there are undisputed -- no. That
21 would not help you.

22 Go ahead.

23 MR. BROWN: That's what my resolution would do
24 actually. The primary objective from what I see of the
25 defendants' motion is procedural. They want to get the case

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1 out of federal court and moved into state court. My proposal
2 was that would allow them to achieve that objective. It would
3 allow them to have the case in state court.

4 THE COURT: Okay.

5 MR. BROWN: Because the relief under the New York
6 Labor Law and FLSA is so similar, substantively their motion,
7 I don't see achieving too much. And again, because of the
8 safe harbor rule, the statute of limitation wouldn't be
9 affected if the Court were to rule in favor of the defendant
10 and to the client supplemental jurisdiction. So my proposal
11 was, with prejudice withdrew the FLSA claim, and then move the
12 case into New York Labor -- into the New York court, as long
13 as the statute of limitations was -- which is tolled back to
14 the date of federal filing, which is what would happen anyway
15 if the Court were to dismiss the claims.

16 Really the issues that they're going for I feel like
17 are more right for trial anyway, given the issues with the
18 time cards. But these issues whether -- you know, the number
19 of hours worked would be decided by a trier of fact at trial
20 anyway.

21 THE COURT: Right.

22 MR. BROWN: So for me this makes sense why we have
23 to have these issues looked at now. Only the procedural issue
24 of which court the case is in would be the main issue. And
25 again, the plaintiff is willing to voluntarily move the case

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1 into state court.

2 THE COURT: So hang on a just second, though.

3 You are willing to withdrew your FLSA claim,
4 correct?

5 MR. BROWN: With prejudice, yes.

6 THE COURT: I'm sorry. Does that not then mean you
7 will not get the benefit of the safe harbor, because I thought
8 the only way you get the safe harbor is if it does not
9 voluntarily terminate?

10 MR. BROWN: That's why we would ask for a tolling
11 agreement. The tolling agreement would say -- then agreed to,
12 and that is why I'm here and we're having the FLSA motion. I
13 think it's kind of pointless -- I'm sorry. I think it's kind
14 of pointless that we have to go through this motion practice
15 for something that I'm willing to concede to anyway.

16 THE COURT: Well, I do not know if the defendants
17 also want to knock out two years of your claim as well. You
18 say that all they want to do is get this into state court
19 instead of here. One of the benefits to them was that if
20 they -- well, I guess if they go through the motion
21 practice --

22 MR. BROWN: We would get a safe harbor anyway.

23 THE COURT: -- you would get the safe harbor. That
24 is a fair important.

25 So what do you say to that, Ms. Nguyen?

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1 MS. NGUYEN: Well, Defendants want judgment to be
2 entered on the record on summary judgment, which is why we
3 filed the premotion conference twice.

4 THE COURT: Right.

5 MS. NGUYEN: So, you know, it is my clients' desire
6 that they want summary judgment to be answered.

7 So to address counsel's point that, you know, he
8 wants to toll the statute of limitations, an option that we
9 suggested to him was to stipulate to summary judgment --

10 THE COURT: Right.

11 MS. NGUYEN: -- and have language in there saying
12 that tolling applies to the same effect as if the Court were
13 to dismiss the statute -- the state claims.

14 THE COURT: Right. But what about his concern that
15 by stipulating to summary judgment, he is, in effect,
16 admitting your version of the facts, which is that the
17 plaintiff didn't work the 72 to 84 hours that he claims? That
18 is their concern, right?

19 Is there a way for him to stipulate to summary
20 judgment without having to concede the undisputed facts that
21 make you win? In other words, can he simply agree that he
22 cannot prove that there is sufficient disputed material facts?

23 MR. BROWN: I mean, that --

24 THE COURT: I mean, it seems to me not a good thing
25 for the plaintiff to do.

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1 MR. BROWN: Yeah. But essentially, that's what
2 we're doing, though. By agreeing to voluntarily withdraw the
3 case with prejudice --

4 THE COURT: Right.

5 MR. BROWN: -- they're getting their judgment. The
6 Court's going to so order it, and that's in their favor saying
7 that we can't ever bring another FLSA claim again.

8 THE COURT: Okay.

9 MR. BROWN: So again, I just don't see the advantage
10 of having to go through the motion practice.

11 THE COURT: So you want the defendants to agree to
12 toll the statute of limitations with respect to that two-year
13 period that would be time barred in state court, right?

14 MR. BROWN: Just the New York Labor Law claim for
15 this two year -- just to the date that the federal case was
16 filed. So the New York Labor Law claim would remain intact.

17 THE COURT: And would that be binding on the state
18 court simply because the defendants agreed to that?

19 MR. BROWN: My understanding is that it would. If
20 you stipulate to the tolling agreement, then the Court --

21 THE COURT: Well, let me ask: It seems to me that
22 that makes some sense.

23 Why do you want a judgment here, other than to use
24 it against the plaintiff in state court.

25 MS. NGUYEN: Well, Your Honor, it's not to

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1 Defendants' advantage to, you know, dismiss it. There's just
2 no benefit to my client agreeing to, you know, voluntary
3 dismissal. But we --

4 THE COURT: Well, conserving resources might be the
5 only thing. Because if you win, then you are still going to
6 have to battle him on two-thirds of his state law claim there
7 because he could still take the nontime-barred portion of his
8 state law claim and merge it with his existing state law
9 claim. So there is a certain efficiency for you, right, of
10 not having to brief it and then still fight with him about the
11 state law claim in state court, right? Because obviously if
12 you win and I dismiss the FLSA, I am going to not exercise
13 supplemental jurisdiction. So you will have some portion of
14 that claim, but I guess, depending on how long it takes the
15 summary judgment to get briefed and decided, that could chip
16 away even further, I think, at your claims, correct?

17 MR. BROWN: Yeah, it would.

18 THE COURT: Okay. So, I mean, obviously, that in
19 the defendants' mind is probably an advantage to them. More
20 time here means lease liability in state court.

21 And I understand that you do not want to have to
22 concede, but there is a certain efficiency. And then if you
23 lose, then you are going to have to go to trial here on all
24 the claims as well as continue to fight with the plaintiff in
25 state court.

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1 Now, that is your calculation -- or that is your
2 decision to make from the strategic point of view. I am not
3 going to force you. But it does strike me that there is some
4 efficiency here by not continuing to litigate the FLSA claim
5 here, even if you win.

6 MS. NGUYEN: And that is certainly a very accurate
7 take on the matters, which is why we're -- you know, the
8 option is still open to stipulate to summary judgment.

9 THE COURT: But what would that look like? What
10 would it say? We agree that the defense would win on summary
11 judgment on the FLSA claim, that's a simple iteration of it,
12 right?

13 MS. NGUYEN: Yes.

14 THE COURT: What would you do, then, in the state
15 court proceeding? Would you then waive that in front of the
16 state court judge and say, He stipulated, essentially that he
17 could not show enough material facts about the wages he was
18 paid or the hours that he worked? Could you use that, do you
19 think, against him as either as *res judicata* or collateral
20 estoppel?

21 MS. NGUYEN: Well, the language of the stipulation
22 we would simply use Plaintiff's sworn testimony that -- in his
23 deposition to show that there are no issues of material facts.
24 So, for example, Plaintiff testified that he was paid between
25 11 to 1200 each pay week, payroll period, which is two weeks

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1 divided by 72 hours per week. So that works out to \$7.64,
2 which is above federal minimum wage. That's the sort of
3 language that we would be putting in. And whether or not, you
4 know, that comes to play for the state court matter, that is
5 the basis for the analysis.

6 THE COURT: Well, according to you, that does not
7 kill your state court claim, right, because the minimum wage
8 is higher?

9 MR. BROWN: Well, again, if you read his entire
10 deposition transcript, he's kind of all over the place. He
11 says one thing and then he says another thing.

12 THE COURT: Well, let me ask you: So under the
13 state labor law regime, too, he would get overtime, right;
14 there isn't this motor carrier exemption?

15 MR. BROWN: The New York regulations say that the
16 motor carrier exemption carries over. They're very -- there
17 is legislation to change that, but currently...

18 THE COURT: Okay. Well, folks, we are sort at a, I
19 don't know, zero-sum game. I mean, unfortunately for the
20 plaintiff, the defendant holds more cards in this situation
21 because they can continue, as they are entitled to do, to move
22 for summary judgment. I certainly cannot stop them and that
23 means, at a minimum, delay for you in getting your claims to
24 state court.

25 MR. BROWN: Well, there is also an additional cost

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1 for the defendants. If they lose on the motion, there's also
2 the issue of attorneys' fees. If they lose on the motion, we
3 can include that, those fee shifting under the FLSA, so the
4 defendants would be necessarily responsible for the
5 plaintiff's attorney's fees if they --

6 THE COURT: If you are successful --

7 MR. BROWN: If we prevail --

8 THE COURT: -- at the very end?

9 MR. BROWN: -- on the motion, yes.

10 THE COURT: Not just on the motion, right? Don't
11 you have to prevail in your claim at trial?

12 MR. BROWN: But I assume if we were to prevail on
13 the summary judgment, we have a pretty good chance of, at
14 least, winning part of the case at trial.

15 THE COURT: I wouldn't say that given what you have
16 told me. It may be. I mean, I think you both explained to me
17 the most salient evidence, and the best I think the plaintiff
18 can hope for is I decide that notwithstanding the written,
19 less refutable paper evidence that your client may convince
20 the jury that he is right for all those reasons --

21 MR. BROWN: Right.

22 THE COURT: -- and maybe some of these other factors
23 that you mentioned, namely, him living in the warehouse and
24 working clearly off hours -- off clock. But I would not say
25 it is a slam drunk. So I think both of you if this goes to

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1 trial have a risk of losing, but I would not say it is
2 necessarily so clear that paying attorney's fees is in the
3 cards for the defendant.

4 MR. BROWN: It's just an added risk. I'm not saying
5 it's a guaranteed thing. There's an added risk for them to go
6 through the motion practice, as I see it, as somewhat
7 unnecessary for the risk of having those added attorney's fees
8 that their defense would be responsible for.

9 THE COURT: Well, let me say this: What I do not
10 understand, though, is the only risk for you in this situation
11 if you go through with the motion is losing the summary
12 judgment motion and then the effect of it being -- having less
13 of your state law claim to bring to the state court. But
14 otherwise, if you prevail on summary judgment, you are going
15 to litigate both your federal and state court claims just in
16 front of a federal jury rather than a state jury, right?

17 MR. BROWN: Yes.

18 THE COURT: Okay. So I think there is a potential
19 upside for you if you think you have a shot at winning the
20 summary judgment motion. I mean, you are not going to lose
21 anything and you will still have your state case on the
22 more-late discovered wage issues, right?

23 MR. BROWN: Just the the timing. It would dispose
24 of both of the proceedings.

25 THE COURT: Right.

1 Now, I do not know what to tell you, other than I am
2 somewhat powerless in this situation. I cannot force the
3 defendant to do what they do not think is in their best
4 interest.

5 I agree, for what it is worth, Ms. Nguyen, that
6 there is some potential upside for the defendants, even in
7 terms of potential cost savings of not litigating a motion
8 here. And then either way, I guess, you either -- if you lose
9 the motion here, we are going to trial, and then you still
10 have the state court case with the plaintiff and he keeps all
11 of his state law claims here. Or you win and you shave off a
12 little bit of the state law claims below, but he will still go
13 forward with his full state action, and you will spend a fair
14 amount of time and money briefing a summary judgment motion.

15 You know, there are advantage and disadvantages on
16 both sides. I could see why you folks are a bit deadlocked on
17 this one. But like I said, sadly, Mr. Brown, right --

18 MR. BROWN: Yeah.

19 THE COURT: -- I cannot do anything other than let
20 the defendants file their motion if they want to.

21 You know, personally I would love it, too, if you
22 went to litigate all the state law claims down there and
23 withdrew the FLSA, because I see this as a difficult summary
24 judgment, I will be honest with you. I think it is going to
25 be a tough one for us based on what I have heard. Obviously,

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1 when I see the full record, that may not be so difficult. But
2 right now, I see it as a close call for both sides, obviously.

3 So with that, I gather, Ms. Nguyen, you still want
4 to file your motion?

5 MS. NGUYEN: Yes, Your Honor.

6 THE COURT: Okay. So let's set dates. Perhaps you
7 guys can talk further off-line and figure out how it makes
8 sense to not go through with that process. But I will set the
9 date and then we will wait to hear from you on your motion.

10 So how much time do you want?

11 MS. NGUYEN: Can I ask for 45 days, Your Honor?

12 THE COURT: Sure, 45 -- oh, we are sensitive about
13 the fact that time is an issue for you, but last time we put
14 it off because there was more discovery. I gather that -- you
15 know what? This is your motion. I am going to give you 30.
16 I am sensitive to the fact that, I guess, if Plaintiff loses
17 at this point, he is going to have less of a state case to go
18 forward.

19 So 30 days.

20 THE COURTROOM DEPUTY: May 10th.

21 THE COURT: Especially since this is your second
22 time asking. So I am hoping that you have some of it
23 prepared.

24 MS. NGUYEN: Yes, Your Honor.

25 THE COURT: Okay. May 10.

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1 And how much time do you want?

2 MR. BROWN: Two to three weeks -- before June 1st
3 would be fine, so, like, three weeks.

4 THE COURT: Three weeks.

5 And then two weeks for the reply.

6 THE COURTROOM DEPUTY: June 15th.

7 THE COURT: Okay.

8 What was the other date?

9 THE COURTROOM DEPUTY: June 15th.

10 THE COURT: No, before that?

11 THE COURTROOM DEPUTY: June 1st, and then May 10th.
12 (Pause in proceedings.)

13 THE COURT: So June 1 for the opposition and
14 June 15th for the reply.

15 And as I may have mentioned before, perhaps not, I
16 do try to follow the bundling rule, which means that you only
17 serve each other on those dates and only on the last date,
18 which is June 15th, do you file your representative submission
19 with one courtesy copy to chambers. You do not have to follow
20 this rule. It is my preference only because it makes it
21 easier for me to give extensions of time because we have
22 internal deadlines that you bump up against the more time that
23 you seek. But if we do it this way, you can take as much time
24 as you need.

25 I realize that it is less of an issue here, because

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1 I imagine the parties are not necessarily going to agree to
2 extend the deadline -- or at least the plaintiff is not,
3 but... So do whatever you want. You can file it when you
4 serve it, or you can wait until the last day. So for this
5 one, I do not think it is going to make a big difference since
6 I do not see the deadline getting extended given the
7 situation.

8 All right. Anything else we need to address?

9 MR. BROWN: Yes. And just since we are all here, I
10 think this is a good time and place to do this. Just the
11 issue of the surveillance footage. I spoke with -- I haven't
12 gotten a definitive yes or no on the issue of the affidavit
13 claiming that there is no surveillance footage. I just want
14 to see what the defendants' position is on that.

15 THE COURT: Well, did discovery close?

16 MR. BROWN: Discovery's closed, but there was an --
17 after discovery was closed, there was an order from the
18 magistrate judge that they were to produce the surveillance
19 footage.

20 THE COURT: Right.

21 MR. BROWN: It did, but there was only the two --
22 you know, the two segments. And I'm fine if they say there's
23 no other footage, but I just want an affidavit, you know, to
24 that effect.

25 THE COURT: Is there any problem with that,

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1 Ms. Nguyen?

2 MS. NGUYEN: Well, Your Honor, discovery has closed,
3 so -- and we have produced all the video clips that are in
4 existence. So I don't see why we have to produce an affidavit
5 saying that there are no video clips where I've been telling
6 counsel -- he has it in writing -- that there's just nothing
7 else to produce.

8 THE COURT: Is there some reason you think there
9 might be others?

10 MR. BROWN: It just seems strange that there's
11 only -- you know, there's only two, you know, that were saved.
12 I just want to have an explanation or, you know, some sort of
13 proof that there's nothing else.

14 THE COURT: Well, is there a custodian for the
15 videotapes, somebody who --

16 MR. BROWN: Her client.

17 THE COURT: -- is going to attest to --

18 MR. BROWN: Her client.

19 THE COURT: -- how they were maintained; why there
20 are only two?

21 MS. NGUYEN: Well, it's a private CCTE system, so it
22 records over itself. So that's why, you know, my client only
23 saved the two video clips to speak to Plaintiff.

24 THE COURT: Okay.

25 MS. NGUYEN: Because Plaintiff, apparently, had this

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1 habit of clocking in and then going about his private
2 business, showering, cooking breakfast, and whatnot while on
3 paid time.

4 THE COURT: Okay.

5 MS. NGUYEN: So the reason why my client saved those
6 two clips was to show Plaintiff, Hey, you know, this is what
7 you do. Please stop doing that.

8 THE COURT: All right.

9 MS. NGUYEN: So that's why there are only two clips.
10 By the time we received Plaintiff's discovery request, the
11 system had already recorded over itself a couple of times.

12 THE COURT: Right. Was there ever any testimony
13 about what you just represented your client would say?

14 MR. BROWN: No, there hasn't been, but...

15 And, again, it's a simple affidavit. I would be
16 satisfied with the issue. But it's just a little strange to
17 me that they are making an issue out of this. That's all.

18 THE COURT: Oh, about giving you an affidavit?

19 MR. BROWN: Yes.

20 THE COURT: Well, I mean, I guess I see why. It's
21 some additional testimony by somebody about the nonexistence
22 of other tapes. But it seems to me to put this issue to rest
23 so that we do not have some battle later if a tape
24 mysteriously appears, if you could have your client simply
25 submit an affidavit to say, We have no other surveillance

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1 tapes in our possession. That would be helpful.

2 So why don't you do that by Friday, just so we can
3 get this done and move on to the briefing of the motion.

4 MR. BROWN: Thank you.

5 THE COURT: You know, my only concern is sometimes
6 when lawyers represent things, it is less binding in some ways
7 than when the client actually represents that he has no more
8 tapes.

9 MS. NGUYEN: Well, Your Honor, for what it's worth,
10 if there were videotapes, we would happily produce them
11 because they would show that, you know, Plaintiff clocked in
12 at certain times, he didn't do his work, and that the records
13 are accurate. But unfortunately, the tapes are just -- do not
14 exist anymore.

15 THE COURT: Right. Well, the plaintiff, obviously,
16 would have a different view. He seems to believe that if
17 there were more tapes, they might show him actually clocking
18 in and doing the work he was paid to do, I gather, right? And
19 so he seems concerned, if not suspicious, about the fact that
20 the only videos that were saved seem to buttress the
21 defendants' claim that he clocked in and then got paid for
22 doing his personal business. So let's just put this to rest
23 by submitting an affidavit or providing an affidavit to
24 Plaintiff from your client indicating that there are no other
25 surveillance tapes that have been saved.

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1 MS. NGUYEN: Yes, Your Honor.

2 THE COURT: Okay. Thank you. And do that by
3 Friday. That will be good so that all the discovery will be
4 done.

5 MS. NGUYEN: Yes, Your Honor.

6 THE COURT: Okay. Terrific.

7 All right. Great. So look forward to hearing from
8 you. If you guys resolve something in the interim, let us
9 know.

10 MR. BROWN: Thank you, Your Honor.

11 THE COURT: Thank you. Nice seeing you.

12 (Matter concluded.)

13 --oo0oo--

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19 *I (we) certify that the foregoing is a correct transcript*
20 *from the record of proceedings in the above-entitled matter.*

20

21

/s/ David R. Roy
DAVID R. ROY

December 13, 2017
Date

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